

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA,)
)
)
VS.)Criminal Action Number:CR -
)
)
 ,)
 Defendant.)
)
_____)

COURT'S PENALTY PHASE INSTRUCTIONS TO THE JURY

INTRODUCTION

NOW THAT YOU HAVE HEARD ALL OF THE EVIDENCE IN THIS CASE AND THE ARGUMENTS OF EACH SIDE, IT IS MY DUTY TO GIVE YOU INSTRUCTIONS AS TO THE LAW APPLICABLE TO THE VERY SERIOUS QUESTION OF WHETHER [DEFENDANT] SHOULD BE SENTENCED FOR HIS CONVICTION ON COUNTS TEN AND ELEVEN TO DEATH OR LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF RELEASE.¹ YOU MUST ALSO DETERMINE WHETHER [DEFENDANT] SHOULD BE SENTENCED FOR HIS CONVICTION ON COUNT TWELVE TO DEATH, LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF RELEASE, OR A LESSER SENTENCE TO BE DETERMINED BY THE COURT.²

¹ *SEE U.S. V. JONES*, 132 F3D 232, 248 (5TH CIR. 1998) (ERROR FOR COURT TO INFORM SENTENCING JURY OF LESSER SENTENCE OPTION IN FDPA WHEN SUBSTANTIVE CRIMINAL STATUTE PERMITTED ONLY DEATH OR LIFE), *AFF'D*, 527 U.S. 373 (1999).

² *SEE HICKS V. OKLAHOMA*, 447 U.S. 343, 346, 100 S.CT. 2227, 2229 (1980) (WHEN STATUTE ALLOWS JURY TO SENTENCE, DUE PROCESS REQUIRES THAT THE JURY MUST BE INFORMED OF ALL SENTENCING OPTIONS).

REGARDLESS OF ANY OPINION YOU MAY HAVE AS TO WHAT THE LAW MAY BE -- OR SHOULD BE -- IT WOULD BE A VIOLATION OF YOUR OATHS AS JURORS TO BASE YOUR VERDICT UPON ANY OTHER VIEW OF THE LAW THAN THAT GIVEN TO YOU IN THESE INSTRUCTIONS.

SOME OF THE LEGAL PRINCIPLES THAT YOU MUST APPLY TO THIS SENTENCING DECISION DUPLICATE THOSE YOU FOLLOWED IN REACHING YOUR VERDICT AS TO GUILT OR INNOCENCE. OTHERS ARE DIFFERENT. I HAVE PREPARED A FULL INSTRUCTION ON THE APPLICABLE LAW IN ORDER TO ENSURE THAT YOU ARE CLEAR IN YOUR DUTIES AT THIS STAGE OF THE CASE. I HAVE ALSO PREPARED A FORM THAT DETAILS SPECIAL FINDINGS YOU ARE ASKED TO MAKE IN THIS CASE AND THE POSSIBLE DECISIONS YOU CAN RENDER.

DEATH PENALTY GENERALLY

IN COUNT TEN, YOU FOUND [DEFENDANT] GUILTY OF TAMPERING WITH A FEDERAL WITNESS BY KILLING HIM. BY LAW, CONGRESS HAS EXPRESSLY PROVIDED THAT ANY PERSON WHO TAMPERS WITH A WITNESS BY KILLING HIM "SHALL BE PUNISHED BY DEATH OR LIFE IMPRISONMENT." IN COUNT ELEVEN, YOU FOUND [DEFENDANT] GUILTY OF KILLING A PERSON AIDING A FEDERAL INVESTIGATION. CONGRESS HAS ALSO EXPRESSLY PROVIDED THAT ANY PERSON WHO KILLS A PERSON AIDING A FEDERAL INVESTIGATION "SHALL BE PUNISHED BY DEATH OR BY IMPRISONMENT." IN COUNT TWELVE, YOU FOUND [DEFENDANT] GUILTY OF COMMITTING A MURDER THROUGH THE USE OF A FIREARM DURING OR IN RELATION TO A DRUG TRAFFICKING CRIME PROSECUTABLE IN A COURT OF THE UNITED STATES. CONGRESS HAS EXPRESSLY PROVIDED THAT ANY PERSON WHO COMMITS MURDER THROUGH THE USE OF A FIREARM DURING OR IN RELATION TO A DRUG TRAFFICKING CRIME PROSECUTABLE IN A COURT

OF THE UNITED STATES SHALL "BE PUNISHED BY DEATH OR BY IMPRISONMENT FOR ANY TERM OF YEARS OR FOR LIFE." FROM THIS BRIEF DESCRIPTION, YOU WILL NOTE THAT WHILE ALL THREE OFFENSES PROVIDE FOR A POSSIBLE SENTENCE OF DEATH OR LIFE IMPRISONMENT, THE CRIME FOR WHICH [DEFENDANT] WAS CONVICTED IN COUNT TWELVE ALSO PERMITS YOU TO CONSIDER THE IMPOSITION OF A LESSER SENTENCE WHICH WILL BE DETERMINED BY THE COURT.

BECAUSE YOU HAVE FOUND THE DEFENDANT _____ GUILTY BEYOND A REASONABLE DOUBT OF THESE THREE CAPITAL CRIMES, YOU MUST NOW DECIDE WHETHER THE APPROPRIATE SENTENCE FOR EACH COUNT INDIVIDUALLY IS (1) DEATH; OR (2) LIFE IN PRISON WITHOUT POSSIBILITY OF RELEASE, OR, (3) IN THE CASE OF COUNT TWELVE ONLY, SOME OTHER LESSER SENTENCE TO BE DECIDED BY THE COURT. YOUR RECOMMENDATION THAT A DEFENDANT BE SENTENCED EITHER TO DEATH OR TO LIFE IN PRISON WITHOUT POSSIBILITY OF RELEASE WILL BE BINDING ON THE COURT AND I WILL SENTENCE THE DEFENDANT ACCORDING TO YOUR RECOMMENDATION. IN THE EVENT YOU CHOOSE THE THIRD OPTION FOR COUNT TWELVE AND RECOMMEND THAT THE DEFENDANT RECEIVE SOME LESSER SENTENCE, I WILL IMPOSE A SENTENCE OTHER THAN DEATH AS AUTHORIZED BY LAW. I AGAIN STRESS THE IMPORTANCE OF YOUR GIVING CAREFUL AND THOROUGH CONSIDERATION TO ALL EVIDENCE BEFORE YOU. I ALSO REMIND YOU OF YOUR OBLIGATION TO FOLLOW STRICTLY THE APPLICABLE LAW.

GOVERNMENT'S BURDEN OF PROOF

THE BURDEN OF PROVING THAT [DEFENDANT] SHOULD BE SENTENCED TO DEATH RESTS AT ALL TIMES WITH THE GOVERNMENT. IF, AFTER FAIR AND IMPARTIAL CONSIDERATION OF ALL THE EVIDENCE IN THIS CASE,

ALL TWELVE OF YOU ARE NOT PERSUADED THAT JUSTICE MANDATES [DEFENDANT'S] EXECUTION, THEN YOU MUST RETURN A DECISION AGAINST THE DEATH PENALTY. **[CUT]** "AND IMPOSE THE OPTION OF LIFE IN PRISON WITHOUT ANY POSSIBILITY OF RELEASE."³

AGE OF THE DEFENDANT

BEFORE YOU MAY CONSIDER THE IMPOSITION OF THE DEATH PENALTY, YOU MUST FIRST UNANIMOUSLY AGREE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS EIGHTEEN YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE. IF YOU UNANIMOUSLY MAKE THAT FINDING, YOU SHOULD SO INDICATE IN SECTION I OF THE SPECIAL VERDICT FORM AND CONTINUE YOUR DELIBERATIONS. IF YOU DO NOT UNANIMOUSLY MAKE THAT FINDING, YOU SHOULD SO INDICATE IN SECTION I OF THE SPECIAL VERDICT FORM, AND NO FURTHER DELIBERATIONS WILL BE NECESSARY WITH REGARD TO THE DEATH SENTENCE.

UNANIMITY REQUIRED FOR DEATH SENTENCE

I INSTRUCT YOU THAT UNANIMITY IS REQUIRED FOR YOU TO SENTENCE [DEFENDANT] TO DEATH. THAT IS, THE DEATH PENALTY MAY NOT BE IMPOSED UNDER OUR LAW UNLESS ALL TWELVE JURORS AGREE. IF AFTER DUE DELIBERATION ANY OF YOU -- EVEN A SINGLE JUROR -- IS NOT PERSUADED THAT THE DEATH PENALTY SHOULD BE IMPOSED IN THIS CASE, THEN THE JURY MAY NOT SENTENCE THE DEFENDANT _____ TO DEATH.

IN THAT EVENT, THE JURY MUST NEXT CONSIDER WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IN PRISON WITHOUT ANY

³ SEE JONES V. U.S., 527 U.S. 373, 119 S.CT. 2090, 2097-2100 (1999)(EIGHTH AMENDMENT DOES NOT REQUIRE COURT TO ADVISE JURY OF EFFECT OF FAILURE TO REACH UNANIMOUS VERDICT).

POSSIBILITY OF RELEASE. AGAIN, SHOULD ALL TWELVE MEMBERS OF THE JURY SO DETERMINE, I WILL IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE. FOR COUNTS TEN AND ELEVEN, CONGRESS HAS PROVIDED THAT LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF RELEASE IS THE ONLY ALTERNATIVE SENTENCE AVAILABLE. THEREFORE, IF ALL TWELVE JURORS DO NOT AGREE THAT THE DEATH PENALTY SHOULD BE IMPOSED, THE ONLY REMAINING SENTENCING VERDICT THAT YOU THE JURY MAY UNANIMOUSLY RETURN IS THAT THE DEFENDANT SHOULD BE SENTENCED TO LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF RELEASE. THIS VERDICT, LIKE A DEATH VERDICT, MUST BE RENDERED BY UNANIMOUS VOTE. FOR COUNT TWELVE, CONGRESS HAS PROVIDED TWO ALTERNATIVE SENTENCING OPTIONS: LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE, OR SOME LESSER SENTENCE TO BE DETERMINED BY THE COURT. YOUR VERDICT ON EITHER OF THESE OPTIONS, LIKE A DEATH VERDICT, MUST BE RENDERED BY UNANIMOUS VOTE.

NOW, THE DEFENDANT AT THIS HEARING DOES NOT HAVE TO PRESENT ANY EVIDENCE. HE DOES NOT HAVE TO PROVE TO YOU THAT HE SHOULD BE PERMITTED TO LIVE. HE WAS, HOWEVER, ENTITLED TO PRESENT ANY MITIGATING FACTS TO YOU--THAT IS, FACTS THAT FAVOR A LESSER PUNISHMENT THAN DEATH--SHOULD HE CHOOSE TO DO SO.

THRESHOLD ELIGIBILITY FACTORS

BEFORE YOU BEGIN YOUR CONSIDERATION OF AGGRAVATING AND MITIGATING FACTORS AND THE SENTENCE TO BE IMPOSED IN THIS CASE, YOU MUST FIRST CONSIDER WHETHER YOU ARE UNANIMOUSLY PERSUADED, BEYOND A REASONABLE DOUBT, THAT THE GOVERNMENT HAS PROVEN AT LEAST ONE "THRESHOLD ELIGIBILITY FACTOR." THERE ARE FOUR

POSSIBLE THRESHOLD ELIGIBILITY FACTORS WHICH DEAL WITH THE DEFENDANT'S INTENT AND ROLE IN COMMITTING THE OFFENSES. YOU WILL BE REQUIRED TO MAKE INDEPENDENT FINDINGS FOR EACH OF THE COUNTS. IF YOU FIND NONE OF THE POSSIBLE THRESHOLD ELIGIBILITY FACTORS PRESENT AS TO A PARTICULAR COUNT, YOUR DELIBERATIONS AS TO THE DEATH PENALTY ON THAT COUNT ARE COMPLETE AND THE COURT SHALL IMPOSE A SENTENCE ON THAT COUNT OTHER THAN DEATH, AS AUTHORIZED BY LAW. YOU SHOULD THEN GO TO THE APPROPRIATE COUNT IN SECTION VI OF THE SPECIAL VERDICT FORM AND INDICATE THAT YOU HAVE NOT FOUND A THRESHOLD ELIGIBILITY FACTOR.

IN THIS CASE, AS TO [DEFENDANT] AND EACH CAPITAL OFFENSE, THE GOVERNMENT ALLEGES FOUR POSSIBLE "THRESHOLD ELIGIBILITY FACTORS":

1) THAT [DEFENDANT] INTENTIONALLY KILLED THE VICTIM;
AND

2) THAT [DEFENDANT] INTENTIONALLY INFLICTED SERIOUS BODILY INJURY THAT RESULTED IN THE DEATH OF THE VICTIM; AND

3) THAT [DEFENDANT] INTENTIONALLY PARTICIPATED IN AN ACT, CONTEMPLATING THAT THE LIFE OF A PERSON WOULD BE TAKEN OR INTENDING THAT LETHAL FORCE WOULD BE USED IN CONNECTION WITH A PERSON, OTHER THAN ONE OF THE PARTICIPANTS IN THE OFFENCE, AND THE VICTIM, _____, DIED AS A DIRECT RESULT OF THE ACT; AND

4) THAT THE DEFENDANT _____ INTENTIONALLY AND SPECIFICALLY ENGAGED IN AN ACT OF VIOLENCE, KNOWING THAT THE ACT CREATED A GRAVE RISK OF DEATH TO A PERSON, OTHER THAN ONE OF THE PARTICIPANTS IN THE OFFENSE, SUCH THAT PARTICIPATION IN THE ACT CONSTITUTED A RECKLESS DISREGARD FOR HUMAN LIFE AND THE VICTIM, _____, DIED AS A DIRECT RESULT OF THE ACT.

AGAIN, THE THRESHOLD ELIGIBILITY FACTORS ARE TO GUIDE YOU IN ASSESSING THE DEFENDANT'S INTENT AND ROLE IN COMMITTING THE OFFENSES. YOU MUST UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT ONE OF THESE FACTORS IS PROVEN BY THE GOVERNMENT AS TO EACH PARTICULAR COUNT IN ORDER TO FURTHER CONSIDER IMPOSITION OF THE DEATH PENALTY WITH RESPECT TO THAT COUNT. I WILL NOW DEFINE FOR YOU EACH OF THE FOUR THRESHOLD ELIGIBILITY FACTORS.

DEFINITION OF INTENTIONALLY KILLING THE VICTIM

FIRST, TO ESTABLISH THAT [DEFENDANT] INTENTIONALLY KILLED THE VICTIM, THE GOVERNMENT MUST PROVE, IN ESSENCE, THAT THE DEFENDANT HAD A CONSCIOUS DESIRE TO AND DID CAUSE THE VICTIM'S DEATH. A PERSON OF SOUND MIND AND DISCRETION MAY BE PRESUMED TO HAVE INTENDED THE ORDINARY, NATURAL, AND PROBABLE CONSEQUENCES OF HIS KNOWING AND VOLUNTARY ACTS. HOWEVER, THIS PRESUMPTION IS NEVER REQUIRED.

THUS, YOU MAY INFER FROM THE DEFENDANT'S CONDUCT THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IF YOU FIND: (1) THAT THE DEFENDANT WAS A PERSON OF SOUND MIND AND DISCRETION; (2) THAT THE VICTIM'S DEATH WAS AN ORDINARY, NATURAL, AND PROBABLE CONSEQUENCE OF THE DEFENDANT'S ACTS; AND (3) THAT THE DEFENDANT COMMITTED THESE ACTS KNOWINGLY AND VOLUNTARILY. BUT ONCE AGAIN, YOU ARE NEVER REQUIRED TO MAKE SUCH AN INFERENCE.

DEFINITION OF INTENTIONALLY INFLICTING SERIOUS BODILY . .

SECOND, TO ESTABLISH THAT [DEFENDANT] INTENTIONALLY INFLICTED SERIOUS BODILY INJURY THAT RESULTED IN THE DEATH OF THE VICTIM, THE GOVERNMENT MUST PROVE, IN ESSENCE, THAT DEFENDANT _____ DELIBERATELY CAUSED SERIOUS INJURY TO THE

VICTIM'S BODY WHICH IN TURN CAUSED THE VICTIM'S DEATH. "SERIOUS BODILY INJURY" MEANS A SIGNIFICANT OR CONSIDERABLE AMOUNT OF INJURY OR DAMAGE TO THE VICTIM'S BODY WHICH INVOLVES A SUBSTANTIAL RISK OF DEATH, UNCONSCIOUSNESS, EXTREME PHYSICAL PAIN, PROTRACTED AND OBVIOUS DISFIGUREMENT, OR PROTRACTED LOSS OR IMPAIRMENT OF THE FUNCTION OF A BODILY MEMBER, ORGAN, OR MENTAL FACULTY.

THUS, YOU MAY INFER FROM THE DEFENDANT'S CONDUCT THAT THE DEFENDANT INTENDED TO INFLICT SERIOUS BODILY INJURY WHICH RESULTED IN THE DEATH OF THE VICTIM IF YOU FIND: (1) THAT THE DEFENDANT WAS A PERSON OF SOUND MIND AND DISCRETION; (2) THAT SERIOUS BODILY INJURY TO THE VICTIM WAS AN ORDINARY, NATURAL, AND PROBABLE CONSEQUENCE OF THE DEFENDANT'S ACTS; AND (3) THAT THE DEFENDANT COMMITTED THESE ACTS KNOWINGLY AND VOLUNTARILY. BUT ONCE AGAIN, YOU ARE NEVER REQUIRED TO MAKE SUCH AN INFERENCE.

DEFINITION OF INTENTIONALLY PARTICIPATING IN ACT, CONTEMPLATING THAT THE LIFE

THIRD, TO ESTABLISH THAT [DEFENDANT] INTENTIONALLY PARTICIPATED IN AN ACT, CONTEMPLATING THAT THE LIFE OF A PERSON WOULD BE TAKEN OR INTENDING THAT LETHAL FORCE WOULD BE USED IN CONNECTION WITH A PERSON, OTHER THAN ONE OF THE PARTICIPANTS IN THE OFFENSE, AND THE VICTIM DIED AS A DIRECT RESULT OF THE ACT. THE GOVERNMENT MUST PROVE, IN ESSENCE, THAT THE DEFENDANT DELIBERATELY COMMITTED CERTAIN ACTS WITH A CONSCIOUS DESIRE THAT THE VICTIM BE KILLED OR THAT LETHAL FORCE BE EMPLOYED AGAINST THE VICTIM, WHICH THEN RESULTED IN THE VICTIM'S DEATH. THE

WORDS "LETHAL FORCE" SHOULD BE GIVEN THEIR ORDINARY, EVERYDAY MEANING OF BEING AN ACT OF VIOLENCE CAPABLE OF CAUSING DEATH.

THUS, YOU MAY INFER FROM THE DEFENDANT'S CONDUCT THAT THE DEFENDANT INTENDED TO ENGAGE IN CONDUCT INTENDING THAT THE VICTIM BE KILLED OR THAT LETHAL FORCE BE EMPLOYED AGAINST THE VICTIM, IF YOU FIND: (1) THAT THE DEFENDANT WAS A PERSON OF SOUND MIND AND DISCRETION; (2) THAT KILLING THE VICTIM OR EMPLOYING LETHAL FORCE AGAINST THE VICTIM WAS AN ORDINARY, NATURAL, AND PROBABLE CONSEQUENCE OF THE DEFENDANT'S ACTS; AND (3) THAT THE DEFENDANT COMMITTED THESE ACTS KNOWINGLY AND VOLUNTARILY. BUT ONCE AGAIN, YOU ARE NEVER REQUIRED TO MAKE SUCH AN INFERENCE.

DEFINITION OF INTENTIONALLY AND SPECIFICALLY ENGAGING IN AN ACT OF VIOLENCE

FOURTH, TO ESTABLISH THAT [DEFENDANT] INTENTIONALLY AND SPECIFICALLY ENGAGED IN AN ACT OF VIOLENCE WHICH HE KNEW WOULD CREATE A GRAVE RISK OF DEATH TO A PERSON OTHER THAN ONE OF THE PARTICIPANTS IN THE OFFENSE SUCH THAT PARTICIPATION IN THE ACT CONSTITUTED A RECKLESS DISREGARD FOR HUMAN LIFE AND WHICH RESULTED IN THE DEATH OF THE VICTIM, THE GOVERNMENT MUST PROVE, IN ESSENCE, THAT THE DEFENDANT DELIBERATELY COMMITTED CERTAIN ACTS WITH RECKLESS DISREGARD OR EXTREME INDIFFERENCE FOR HUMAN LIFE. "GRAVE RISK OF DEATH," IN THIS CONTEXT, MEANS A SIGNIFICANT AND CONSIDERABLE POSSIBILITY THAT A PERSON OTHER THAN ONE OF THE PARTICIPANTS IN THE CRIME MIGHT BE KILLED. "KNOWINGLY" CREATING SUCH A RISK MEANS THAT THE DEFENDANT WAS CONSCIOUS AND AWARE THAT HIS CONDUCT MIGHT HAVE THIS RESULT.

KNOWLEDGE MAY BE PROVED BY THE DEFENDANT'S CONDUCT, STATEMENTS AND BY ALL THE FACTS AND SURROUNDING CIRCUMSTANCES.

THUS, YOU MAY INFER FROM THE DEFENDANT'S CONDUCT THAT THE DEFENDANT INTENDED TO ENGAGE IN AN ACT OF VIOLENCE WHICH THE DEFENDANT KNEW WOULD CREATE A GRAVE RISK OF DEATH TO A PERSON OTHER THAN ONE OF THE PARTICIPANTS IN THE OFFENSE, IF YOU FIND: (1) THAT THE DEFENDANT WAS A PERSON OF SOUND MIND AND DISCRETION; (2) THAT CREATING A GRAVE RISK OF DEATH TO A PERSON OTHER THAN ONE OF THE PARTICIPANTS IN THE OFFENSE WAS AN ORDINARY, NATURAL, AND PROBABLE CONSEQUENCE OF THE DEFENDANT'S ACTS; AND (3) THAT THE DEFENDANT COMMITTED THESE ACTS KNOWINGLY AND VOLUNTARILY. BUT ONCE AGAIN, YOU ARE NEVER REQUIRED TO MAKE SUCH AN INFERENCE.

ISSUES TO BE DECIDED

LET ME NOW DISCUSS WITH YOU THE DELIBERATIVE STEPS YOU SHOULD FOLLOW IN CONSIDERING THE VERY SERIOUS ISSUE BEFORE YOU. OF COURSE, BEFORE YOU CONSIDER AGGRAVATING OR MITIGATING FACTORS, YOU MUST MAKE A DETERMINATION CONCERNING THE AGE AND PERSONAL INTENT OF THE DEFENDANT _____ IN REGARD TO THE HOMICIDE WHICH HE HAS BEEN CONVICTED OF COMMITTING. IF YOU UNANIMOUSLY RESOLVE THE PRELIMINARY MATTERS OF THE DEFENDANT'S AGE AND THE THRESHOLD ELIGIBILITY FACTOR INQUIRY IN FAVOR OF THE GOVERNMENT, YOU MUST THEN TAKE UP THE QUESTION OF [DEFENDANT'S] SENTENCE. AS I TOLD YOU EARLIER, IF YOU HAVE NOT RESOLVED THESE PRELIMINARY MATTERS IN FAVOR OF THE GOVERNMENT YOU MAY NOT CONSIDER THE IMPOSITION OF THE DEATH PENALTY. I REMIND YOU THAT YOU WILL BE REQUIRED TO MAKE INDEPENDENT FINDINGS FOR EACH OF

COUNTS TEN, ELEVEN, AND TWELVE.

FIRST, YOU MUST CONSIDER WHETHER THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT, AND TO YOUR UNANIMOUS SATISFACTION, AT LEAST ONE STATUTORY AGGRAVATING FACTOR I INSTRUCT YOU ON FROM THE STATUTORY CATEGORIES ESTABLISHED BY CONGRESS.

SECOND, YOU MUST CONSIDER WHETHER ANY NON-STATUTORY AGGRAVATING FACTORS CLAIMED BY THE GOVERNMENT AND WHICH I INSTRUCT YOU ON ARE PROVED TO YOUR UNANIMOUS SATISFACTION BEYOND A REASONABLE DOUBT.

THIRD, YOU MUST CONSIDER WHETHER ANY OF YOU FIND MITIGATING FACTORS TO HAVE BEEN ESTABLISHED BY THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE.

FOURTH, YOU MUST EACH DECIDE WHETHER ANY LISTED AGGRAVATING FACTOR OR FACTORS YOU HAVE UNANIMOUSLY FOUND TO EXIST OUTWEIGH THE SUM OF ALL MITIGATING FACTOR OR FACTORS THAT YOU HAVE INDIVIDUALLY FOUND TO EXIST.

FIFTH, IF YOU DO FIND THAT THE AGGRAVATING FACTOR OR FACTORS OUTWEIGH THE MITIGATING FACTOR OR FACTORS, YOU MUST THEN DECIDE WHETHER THEY SUFFICIENTLY OUTWEIGH THE MITIGATING FACTORS, AND ARE IN THEMSELVES SUFFICIENTLY SERIOUS, TO JUSTIFY SENTENCING THE DEFENDANT TO DEATH RATHER THAN TO LIFE IN PRISON WITHOUT ANY POSSIBILITY OF RELEASE, OR, FOR COUNT TWELVE ONLY, TO SOME LESSER SENTENCE TO BE DETERMINED BY THE COURT.

WHETHER ANY GIVEN AMOUNT OF AGGRAVATION, ONCE PROVEN, IS "SUFFICIENT" TO WARRANT ACTUALLY SENTENCING THIS DEFENDANT TO DEATH IS A QUESTION THAT THE LAW LEAVES ENTIRELY UP TO YOU.

THE FIFTH AND LAST STEP IS SIGNIFICANT FOR, AS I HAVE ALREADY TOLD YOU, EVEN IF YOU FIND THAT THE GOVERNMENT HAS PROVEN THE EXISTENCE OF AGGRAVATING FACTORS THAT OUTWEIGH MITIGATING FACTORS, YOU ARE STILL NOT REQUIRED TO IMPOSE A

SENTENCE OF DEATH UPON A DEFENDANT. ABSENT THESE UNANIMOUS FINDINGS, HOWEVER, YOU CANNOT SENTENCE THE DEFENDANT _____ TO DEATH.

LET ME NOW DISCUSS THE VARIOUS STEPS WITH YOU.

STATUTORY AGGRAVATING FACTORS

IF YOU FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT _____ POSSESSED ONE OF THE FOUR TYPES OF INTENT DISCUSSED IN THE THRESHOLD ELIGIBILITY FACTORS WHEN HE KILLED THE VICTIM, THEN YOU MUST PROCEED FURTHER TO CONSIDER THE QUESTION OF HIS APPROPRIATE SENTENCE. TO DO THIS, YOU MUST FIRST CONSIDER WHETHER YOU ARE UNANIMOUSLY PERSUADED THAT THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT AT LEAST ONE STATUTORY AGGRAVATING FACTOR FROM THE STATUTORY CATEGORIES ESTABLISHED BY CONGRESS.

STATUTORY AGGRAVATING FACTORS

THE STATUTORY AGGRAVATING FACTORS FOCUS ON THE NATURE AND CIRCUMSTANCES OF THE CRIME, THE CONDUCT OF THE DEFENDANT, AND THE DEFENDANT'S PAST CRIMINAL RECORD, IF ANY. YOU MAY FIND NONE, ONE, OR MORE THAN ONE OF THESE FACTORS HAS BEEN ESTABLISHED. BECAUSE YOU MUST MAKE FINDINGS FOR EACH COUNT, IF YOU FAIL TO FIND AT LEAST ONE OF THE ALLEGED STATUTORY AGGRAVATING FACTORS PRESENT FOR ANY COUNT, YOU SHOULD CEASE YOUR DELIBERATIONS ON THAT COUNT, PROCEED TO SECTION VI OF THE SPECIAL VERDICT FORM, AND INDICATE FOR THE APPROPRIATE COUNT THAT YOU HAVE NOT FOUND A STATUTORY AGGRAVATING FACTOR.

I WILL NOW LIST FOR YOU THE STATUTORY AGGRAVATING FACTORS WHICH THE GOVERNMENT HAS OFFERED UNDER EACH COUNT OF THE

INDICTMENT FOR WHICH THE DEATH PENALTY IS AUTHORIZED. BECAUSE THE GOVERNMENT SEEKS TO PROVE THE SAME TWO STATUTORY AGGRAVATING FACTORS FOR EACH OF COUNTS TEN, ELEVEN, AND TWELVE, I WILL NOT REPEAT MY EXPLANATION OF THE ALLEGED STATUTORY AGGRAVATING FACTORS FOR EACH COUNT. KEEP IN MIND, HOWEVER, THAT YOU MUST MAKE A SEPARATE FINDING FOR EACH COUNT INDEPENDENTLY.

STATUTORY AGGRAVATING FACTORS.

THE GOVERNMENT CLAIMS THAT THE FOLLOWING STATUTORY AGGRAVATING FACTORS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

- 1) [DEFENDANT] COMMITTED THE INTENTIONAL KILLING AFTER SUBSTANTIAL PLANNING AND PREMEDITATION.
- 2) [DEFENDANT], IN THE COMMISSION OF THE OFFENSE, OR IN ESCAPING APPREHENSION FOR THE OFFENSE, KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ONE OR MORE PERSONS IN ADDITION TO THE VICTIM OF THE OFFENSE.

IF, AFTER CONSIDERING ALL OF THE EVIDENCE YOU ARE LEFT WITH A REASONABLE DOUBT AS TO WHETHER EITHER OF THESE AGGRAVATING FACTORS HAVE BEEN PROVEN FOR EACH COUNT WITH RESPECT TO THE INTENTIONAL KILLING AND [DEFENDANT'S] ROLE IN IT, YOU MUST RESOLVE THAT DOUBT IN DEFENDANT _____'S FAVOR, AND YOU MAY NOT FIND THE STATUTORY AGGRAVATING FACTOR TO HAVE BEEN ESTABLISHED. IF YOU DO NOT FIND BEYOND A REASONABLE DOUBT THAT EITHER STATUTORY AGGRAVATING FACTOR HAS BEEN ESTABLISHED FOR A PARTICULAR COUNT, REPORT SUCH TO THE COURT IN SECTION VI OF THE SPECIAL VERDICT FORM.

DEFINITION OF SUBSTANTIAL PLANNING AND PREMEDITATION

LET ME DISCUSS WITH YOU THE TWO STATUTORY AGGRAVATING FACTORS RELIED UPON BY THE GOVERNMENT.

IF YOU HAVE REACHED THE STAGE OF THE PROCEEDINGS WHERE YOU ARE CONSIDERING STATUTORY AGGRAVATING FACTORS, YOU WILL NECESSARILY HAVE BOTH FOUND THE DEFENDANT GUILTY OF HOMICIDE, AND HAVE FOUND THAT HE INTENDED TO COMMIT THE HOMICIDE TO THE EXTENT SPECIFIED IN SECTION II OF THE SPECIAL VERDICT FORM. IN OTHER WORDS, YOU COULD NOT HAVE REACHED THIS STAGE OF YOUR DELIBERATIONS UNLESS YOU HAD ALREADY FOUND THAT [DEFENDANT] INTENTIONALLY KILLED THE VICTIM OR CAUSED THE VICTIM'S DEATH. THE "PREMEDITATION" AND "SUBSTANTIAL PLANNING" STATUTORY AGGRAVATING FACTOR RELIED UPON BY THE GOVERNMENT HERE REQUIRES MORE.

IN ORDER TO DETERMINE WHETHER THE FIRST ALLEGED STATUTORY AGGRAVATING FACTOR HAS BEEN ESTABLISHED, YOU MUST NOW CONSIDER WHETHER THE GOVERNMENT HAS PROVED TO YOUR UNANIMOUS SATISFACTION, AND BEYOND A REASONABLE DOUBT, THAT THIS KILLING WAS BOTH INTENTIONAL AND PREMEDITATED. ADDITIONALLY, IN ORDER TO FIND THIS STATUTORY AGGRAVATING FACTOR, YOU MUST ALSO FIND BEYOND A REASONABLE DOUBT THAT [DEFENDANT] PERSONALLY ENGAGED IN "SUBSTANTIAL PLANNING."

THE GOVERNMENT DOES NOT ESTABLISH "SUBSTANTIAL PLANNING AND PREMEDITATION" SIMPLY BY SHOWING THAT A MURDER WAS PREMEDITATED, OR THAT SOME SMALL AMOUNT OF PLANNING PRECEDED IT. RATHER, THE GOVERNMENT MUST SHOW THAT THE MURDER WAS BOTH UNUSUALLY OR EXCEPTIONALLY PREMEDITATED AND THAT IT WAS PRECEDED BY AN UNUSUAL DEGREE OF PLANNING, COMPARED TO MOST PREMEDITATED MURDERS.

IN DECIDING WHETHER THE EVIDENCE ESTABLISHES THE EXISTENCE OF THIS STATUTORY AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT, YOU SHOULD CONSIDER ALL OF THE RELEVANT EVIDENCE IN THIS CASE, RELATING BOTH TO THE CRIMES AND TO THE DEFENDANT, _____.

DEFINITION OF KNOWINGLY CREATE A GRAVE RISK OF DEATH TO OTHERS

IN DETERMINING WHETHER THE SECOND STATUTORY AGGRAVATING FACTOR HAS BEEN ESTABLISHED, YOU MUST CONSIDER WHETHER THE GOVERNMENT HAS PROVEN BEYOND A REASONABLE DOUBT AND TO YOUR UNANIMOUS SATISFACTION THAT THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ONE OR MORE PERSONS IN ADDITION TO THE VICTIM OF THE OFFENSE, IN COMMITTING THE OFFENSE OR IN ESCAPING APPREHENSION FOR THE OFFENSE. "PERSONS IN ADDITION TO THE VICTIM" MEANS BYSTANDERS IN THE ZONE OF DANGER CREATED BY THE DEFENDANT'S ACTS. THIS DOES NOT INCLUDE INTENDED VICTIMS OF THE OFFENSE; NOR DOES IT INCLUDE OTHER PARTICIPANTS IN THE OFFENSE.

"GRAVE RISK OF DEATH" MEANS A SIGNIFICANT AND CONSIDERABLE POSSIBILITY THAT AN UNINTENDED VICTIM MIGHT BE KILLED.

"KNOWINGLY" CREATING SUCH A RISK MEANS THAT THE DEFENDANT WAS CONSCIOUS AND AWARE THAT HIS CONDUCT IN THE COURSE OF COMMITTING THE OFFENSE OR ESCAPING APPREHENSION FOR THE OFFENSE MIGHT HAVE THIS RESULT.

IN OTHER WORDS, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT HAD RECKLESS DISREGARD OR EXTREME INDIFFERENCE FOR HUMAN LIFE. KNOWLEDGE MAY BE PROVED BY THE DEFENDANT'S CONDUCT, STATEMENTS AND BY ALL THE FACTS AND SURROUNDING CIRCUMSTANCES. ONCE AGAIN, YOU MAY, BUT ARE NOT REQUIRED TO, INFER THAT A

PERSON OF SOUND MIND KNOWS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS VOLUNTARY AND INTENTIONAL ACTS.

NON-STATUTORY AGGRAVATING FACTORS

IF YOU FIND AT LEAST ONE OF THE TWO STATUTORY AGGRAVATING FACTORS I HAVE DESCRIBED TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT AND TO YOUR UNANIMOUS SATISFACTION, YOU MUST NEXT CONSIDER WHETHER ANY OTHER NON-STATUTORY AGGRAVATING FACTORS CLAIMED BY THE GOVERNMENT AND ON WHICH I INSTRUCT YOU HAVE BEEN PROVEN TO YOUR UNANIMOUS SATISFACTION BEYOND A REASONABLE DOUBT.

I INSTRUCT YOU THAT THE LAW PERMITS YOU TO CONSIDER AND DISCUSS ONLY THOSE NON-STATUTORY AGGRAVATING FACTORS SPECIFICALLY CLAIMED BY THE GOVERNMENT WHICH I WILL DESCRIBE, AND NO OTHERS. THE JURY IS NOT FREE TO CONSIDER ANY OTHER FACTS IN AGGRAVATION WHICH THE GOVERNMENT MAY HAVE ARGUED IN CLOSING OR WHICH YOU CONCEIVE ON YOUR OWN. YOU MAY CONSIDER ONLY THE FOLLOWING GOVERNMENT CLAIMS, IF PROVEN AS TO [DEFENDANT] AND TO YOUR UNANIMOUS SATISFACTION BEYOND REASONABLE DOUBT:

1) [DEFENDANT] CAUSED INJURY, HARM, AND LOSS TO THE VICTIM'S FAMILY BECAUSE OF THE VICTIM'S PERSONAL CHARACTERISTICS AS AN INDIVIDUAL HUMAN BEING AND THE IMPACT OF THE DEATH UPON THE VICTIM'S FAMILY.

2) [DEFENDANT] COMMITTED THE OFFENSE FOR THE PURPOSE OF PREVENTING THE VICTIM FROM, OR RETALIATING AGAINST THE VICTIM FOR, PROVIDING INFORMATION AND ASSISTANCE TO LAW ENFORCEMENT AUTHORITIES IN REGARD TO THE INVESTIGATION OR PROSECUTION OF THE COMMISSION OR POSSIBLE COMMISSION OF ANOTHER OFFENSE.

I EMPHASIZE AGAIN, BECAUSE THESE ARE THE ONLY OTHER AGGRAVATING FACTORS CITED BY THE GOVERNMENT ON WHICH I INSTRUCT YOU, THEY ARE BY LAW THE ONLY OTHER AGGRAVATING FACTORS THAT YOU MAY CONSIDER.

SECTION IV OF THE SPECIAL VERDICT FORM, ASKS WHETHER YOU ARE UNANIMOUSLY PERSUADED THAT THE GOVERNMENT HAS PROVED EITHER OR BOTH OF THESE NON-STATUTORY AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT. I NOTE THAT, EVEN IF YOU ARE NOT SO PERSUADED, A UNANIMOUS JURY FINDING THAT THE GOVERNMENT HAS PROVED AT LEAST ONE AGGRAVATING FACTOR FROM THE STATUTORY CATEGORY, WHICH I JUST DISCUSSED WITH YOU, DOES PERMIT YOU TO CONSIDER THE DEATH PENALTY, AS WELL AS THE OPTION OF LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF RELEASE.

IN SHORT, YOU MAY ONLY CONSIDER THE DEATH PENALTY IF AT LEAST ONE STATUTORY AGGRAVATING FACTOR HAS BEEN PROVED. BUT, IF YOU SO FIND, YOU MAY CONSIDER THE DEATH PENALTY AS WELL AS LIFE IMPRISONMENT WITHOUT ANY POSSIBILITY OF RELEASE IN THE ABSENCE OF ANY FINDING OF A NON-STATUTORY AGGRAVATING FACTOR.

MITIGATING FACTORS

YOU MUST NEXT CONSIDER ANY MITIGATING FACTORS THAT MAY BE PRESENT IN THIS CASE. A MITIGATING FACTOR IS NOT OFFERED TO JUSTIFY OR EXCUSE A DEFENDANT'S CONDUCT. INDEED, IF A HOMICIDE WAS JUSTIFIABLE OR EXCUSABLE, A DEFENDANT WOULD NOT BE GUILTY OF MURDER. A MITIGATING FACTOR INSTEAD IS INTENDED TO PRESENT EXTENUATING FACTS ABOUT THE DEFENDANT'S LIFE OR CHARACTER, RECORD, OR THE CIRCUMSTANCES SURROUNDING THE CAPITAL CRIMES FOR WHICH HE HAS BEEN CONVICTED, OR OTHER SIMILAR RELEVANT FACTORS,

THAT WOULD SUGGEST THAT A SENTENCE OF DEATH IS NOT APPROPRIATE.

IT IS THE DEFENDANT'S BURDEN TO ESTABLISH ANY MITIGATING FACTORS BY A PREPONDERANCE OF THE EVIDENCE. THIS IS A LESSER STANDARD OF PROOF UNDER THE LAW THAN PROOF BEYOND A REASONABLE DOUBT. IT MEANS THAT THE DEFENDANT HAS TO PRODUCE EVIDENCE WHICH, CONSIDERED IN THE LIGHT OF ALL THE FACTS, LEADS YOU TO BELIEVE THAT WHAT THE DEFENDANT CLAIMS IS MORE LIKELY TRUE THAN NOT TRUE.

THE MITIGATING FACTORS DIFFER FROM AGGRAVATING FACTORS IN ANOTHER IMPORTANT WAY. UNLIKE AGGRAVATING FACTORS, WHICH THE JURY MUST UNANIMOUSLY AGREE TO EXIST, ANY MEMBER OF THE JURY WHO FINDS THE EXISTENCE OF A MITIGATING FACTOR BY A PREPONDERANCE OF THE EVIDENCE MAY CONSIDER SUCH A FACTOR ESTABLISHED REGARDLESS OF THE NUMBER OF JURORS WHO CONCUR THAT THE FACTOR HAS BEEN ESTABLISHED.

LG 13- MITIGATING FACTORS TO CONSIDER

THE MITIGATING FACTORS RELIED UPON BY THE DEFENSE IN THIS CASE ARE:

1) [DEFENDANT'S] CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS IMPAIRED, REGARDLESS OF WHETHER HIS CAPACITY WAS SO IMPAIRED AS TO CONSTITUTE A DEFENSE TO THE CHARGE.

2) [DEFENDANT] WAS UNDER DURESS, REGARDLESS OF WHETHER THE DURESS WAS OF SUCH A DEGREE AS TO CONSTITUTE A DEFENSE TO THE CHARGE.

3) [DEFENDANT] DOES NOT HAVE A SIGNIFICANT PRIOR

CRIMINAL RECORD.

4) OTHER PERSONS, EQUALLY CULPABLE IN THE CRIMES, WILL NOT BE PUNISHED BY DEATH.

5) SHOULD THE JURY SO DIRECT, [DEFENDANT] WILL BE SENTENCED TO LIFE IN PRISON WITHOUT ANY POSSIBILITY OF RELEASE.

6) [DEFENDANT] WAS SUBJECTED TO EMOTIONAL AND PHYSICAL ABUSE, ABANDONMENT AND NEGLECT AS A CHILD, AND WAS DEPRIVED OF PARENTAL GUIDANCE AND PROTECTION.

7) [DEFENDANT] SUFFERS FROM BRAIN DYSFUNCTION WHICH HAS IMPAIRED HIS ABILITY TO FUNCTION IN THE ABSENCE OF STRONG SUPPORT AND GUIDANCE.

8) [DEFENDANT] GREW UP IN AN IMPOVERISHED, VIOLENT AND BRUTAL ENVIRONMENT, AND WAS EXPOSED TO EXTREME VIOLENCE AS A CHILD AND THROUGHOUT HIS LIFE.

9) [DEFENDANT] COMMITTED THE KILLING UNDER A MENTAL AND/OR EMOTIONAL DISTURBANCE.

10) [DEFENDANT] SUFFERS FROM NEUROLOGICAL IMPAIRMENTS WHICH WERE IDENTIFIED AND WHICH COULD HAVE BEEN TREATED WHEN HE WAS A CHILD AND ADOLESCENT.

11) [DEFENDANT] WAS INTRODUCED TO ADDICTIVE DRUGS AND ALCOHOL WHILE STILL A CHILD, AND WAS SUPPORTED AND REINTRODUCED INTO DRUG SELLING BY HIS OWN FATHER.

12) [DEFENDANT] HAS RESPONDED INVARIABLY WELL TO STRUCTURED ENVIRONMENTS, AND WOULD LIKELY MAKE AN EXCELLENT ADAPTION TO PRISON IF HE WERE SENTENCED TO LIFE IN PRISON.

13) THAT OTHER FACTORS IN [DEFENDANT'S] CHILDHOOD, BACKGROUND OR CHARACTER MITIGATE AGAINST IMPOSITION OF THE DEATH SENTENCE.

THE LAST FACTOR, WHICH DERIVES FROM THE STATUTE, PERMITS YOU TO CONSIDER ANYTHING ELSE ABOUT THE COMMISSION OF THE CRIME OR ABOUT [DEFENDANT'S] BACKGROUND OR CHARACTER THAT WOULD

MITIGATE AGAINST IMPOSITION OF THE DEATH PENALTY. THUS, IF THERE ARE ANY SUCH MITIGATING FACTORS, WHETHER OR NOT SPECIFICALLY ARGUED BY DEFENSE COUNSEL, BUT WHICH ARE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE, YOU ARE FREE TO CONSIDER THEM IN YOUR DELIBERATIONS.

IN SHORT, YOUR DISCRETION IN CONSIDERING MITIGATING FACTORS IS MUCH BROADER THAN YOUR DISCRETION IN CONSIDERING AGGRAVATING FACTORS. THIS WAS A CHOICE EXPRESSLY MADE BY CONGRESS IN ENACTING THE CAPITAL PUNISHMENT STATUTE HERE AT ISSUE. NOW, YOU ARE ASKED ON THE JURY FORM TO IDENTIFY ANY SUCH ADDITIONAL MITIGATING FACTORS THAT ANY ONE OF YOU CONSIDERS. IF, HOWEVER, YOU DO THINK THERE IS SOME OTHER MITIGATING FACTOR PRESENT, BUT ARE SIMPLY NOT ABLE TO PUT IT INTO WORDS SO THAT YOU CAN WRITE IT DOWN ON A LIST, YOU SHOULD STILL GIVE THAT FACTOR YOUR FULL CONSIDERATION.

SECTION V OF THE SPECIAL VERDICT FORM RELATES TO MITIGATING FACTORS.

DEFINITION OF RELATIVE CULPABILITY

NEARLY ALL OF THE MITIGATING FACTORS I HAVE DESCRIBED ARE SELF-EXPLANATORY. HOWEVER, THERE IS ONE MITIGATING FACTOR WHICH REQUIRES SOME EXPLANATION BY THE COURT.

ONE MITIGATING FACTOR UPON WHICH [DEFENDANT] RELIES, "THAT OTHER PERSONS, EQUALLY CULPABLE IN THE CRIME, WILL NOT BE PUNISHED BY DEATH," ALLOWS YOU TO TAKE INTO ACCOUNT AS A REASON NOT TO IMPOSE THE DEATH PENALTY THE FACT -- IF YOU FIND IT TO BE SO BY THE PREPONDERANCE OR GREATER WEIGHT OF THE EVIDENCE -- THAT OTHER PARTICIPANTS IN THE KILLING WILL NOT BE SENTENCED TO

DEATH AND EXECUTED, EVEN THOUGH THEY MIGHT BE EQUALLY OR EVEN MORE RESPONSIBLE THAN [DEFENDANT] FOR THE VICTIM'S DEATH.

THE LAW REQUIRES CONSIDERATION OF THIS MITIGATING FACTOR TO ALLOW JURIES TO CONSIDER WHAT IS FAIR, CONSIDERING ALL OF THE PERSONS RESPONSIBLE FOR AN INTENTIONAL KILLING, BEFORE IMPOSING A SENTENCE OF DEATH.

I CAUTION YOU, HOWEVER, THAT THIS IS A MITIGATING FACTOR ONLY. BY THAT I MEAN THAT THE SENTENCE IMPOSED ON ANY OTHER PERSON IN THIS CASE MAY ONLY BE CONSIDERED BY YOU AS A REASON TO DECIDE AGAINST THE DEATH PENALTY. THE POSSIBLE SENTENCES OF THE OTHER PARTICIPANTS IN THE KILLING MAY NEVER BE CONSIDERED AS A REASON TO IMPOSE THE DEATH PENALTY ON A PARTICULAR DEFENDANT.

NO UNANIMITY REQUIRED AS TO MITIGATING FACTORS

ANY EVIDENCE RELATING TO MITIGATING FACTORS SHOULD BE FULLY DISCUSSED BY ALL OF YOU TO ENSURE THAT EACH JUROR CONSIDERS THE MATTER CAREFULLY. I DO INSTRUCT YOU, HOWEVER, THAT, UNLIKE AGGRAVATING FACTORS, WHICH YOU MUST UNANIMOUSLY FIND PROVED BEYOND A REASONABLE DOUBT IN ORDER FOR YOU TO CONSIDER THEM IN YOUR DELIBERATIONS, THE LAW DOES NOT REQUIRE UNANIMITY WITH REGARD TO MITIGATING FACTORS. ANY JUROR PERSUADED OF THE EXISTENCE OF A MITIGATING FACTOR BY A PREPONDERANCE OF THE EVIDENCE MUST CONSIDER IT IN THIS CASE. THUS, IN SECTION V OF THE SPECIAL VERDICT FORM RELATING TO MITIGATING FACTORS, YOU ARE ASKED TO REPORT THE TOTAL NUMBER OF JURORS THAT FIND A MITIGATING FACTOR ESTABLISHED.

MITIGATING CIRCUMSTANCES DO NOT INCLUDE RESIDUAL DOUBT

YOU HAVE FOUND THE DEFENDANT GUILTY OF THREE CAPITAL

CRIMES. YOUR CONSIDERATION OF GUILT OR INNOCENCE HAS, THEREFORE, BEEN COMPLETED. YOU MUST NOW DETERMINE AN APPROPRIATE PUNISHMENT. IN CONSIDERING THE APPROPRIATE PUNISHMENT TO RECOMMEND, YOU ARE NOT TO REVISIT THE ISSUE OF GUILT OR INNOCENCE. ALL TWELVE JURORS ARE BOUND BY YOUR VERDICT IN THE FIRST PORTION OF THIS CASE.

YOU MUST, OF COURSE, CONSIDER ANY MITIGATING CIRCUMSTANCES YOU FIND TO EXIST. MITIGATING CIRCUMSTANCES ARE FACTS ABOUT THE DEFENDANT'S CHARACTER, BACKGROUND, OR RECORD, OR THE CIRCUMSTANCES OF THE PARTICULAR OFFENSES, OR OTHER SIMILAR RELEVANT FACTOR, THAT MAY CALL FOR A PENALTY LESS THAN DEATH. THE DEFENDANT HAS BEEN FOUND GUILTY AND ANY LINGERING DOUBT THAT YOU MAY HAVE ABOUT THEIR GUILT IS NOT A MITIGATING CIRCUMSTANCE AND CANNOT BE CONSIDERED BY YOU IN DETERMINING THE APPROPRIATE PUNISHMENT.

WEIGHING AGGRAVATING AND MITIGATING FACTORS

ONCE YOU HAVE DECIDED UPON THE AGGRAVATING AND MITIGATING FACTORS PRESENT IN THIS CASE, THE LAW REQUIRES YOU TO EVALUATE THESE FACTORS TO DECIDE WHETHER YOU ARE UNANIMOUSLY PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS PROVED SO OUTWEIGH ANY MITIGATING FACTORS THAT JUSTICE CANNOT BE SERVED ABSENT A SENTENCE OF DEATH.

WHEN I SPEAK OF JUSTICE, LADIES AND GENTLEMEN, I SPEAK OF THE HIGHEST IDEAL OF THE LAW, AND THE STANDARD BY WHICH CIVILIZED SOCIETIES ARE MEASURED. JUSTICE CONTEMPLATES THE CAREFUL APPLICATION OF HUMAN REASON AND EXPERIENCE TO A SET OF CIRCUMSTANCES. IT CONTEMPLATES AN EVEN-HANDED WEIGHING OF THOSE

CIRCUMSTANCES IN AN EFFORT TO REACH A "FAIR" OR "CORRECT" RESULT. THUS, PASSION, PREJUDICE, AND ANY ARBITRARY CONSIDERATIONS HAVE NO ROLE TO PLAY IN YOUR EFFORTS TO REACH A JUST RESULT IN THIS CASE.

IN CAREFULLY WEIGHING THE VARIOUS FACTORS AT ISSUE IN THIS CASE, YOU ARE CALLED UPON TO MAKE A UNIQUE, INDIVIDUALIZED JUDGMENT ABOUT THE APPROPRIATENESS OF EXECUTING [DEFENDANT]. THIS IS NOT A MECHANICAL PROCESS. NEITHER IS IT DETERMINED BY RAW NUMBERS. YOU DO NOT SIMPLY COUNT FACTORS. YOU CONSIDER THEM QUALITATIVELY. ANY ONE AGGRAVATING FACTOR PROVED, IF SUFFICIENTLY SERIOUS, MAY OUTWEIGH SEVERAL MITIGATING FACTORS. THUS, EVEN IF YOU WERE ONLY TO FIND ONE STATUTORY AGGRAVATING FACTOR PROVED, AND NO NON-STATUTORY FACTOR, YOU WOULD STILL HAVE TO CONSIDER IT CAREFULLY AGAINST THE MITIGATING FACTORS. ON THE OTHER HAND, YOU MUST RECOGNIZE THAT A SINGLE MITIGATING FACTOR MAY OUTWEIGH SEVERAL AGGRAVATING FACTORS.

IN SHORT, LADIES AND GENTLEMEN, WHAT IS CALLED FOR IN WEIGHING THE VARIOUS FACTORS IS NOT ARITHMETIC, BUT YOUR CAREFUL, YOUR CONSIDERED, YOUR MATURE JUDGMENT. AT THIS STAGE IN THE PROCESS, YOU ARE NOT CALLED UPON SIMPLY TO FIND RELEVANT FACTORS. YOU ARE CALLED UPON TO DECIDE WHETHER THE DEFENDANT SHALL LIVE OR DIE.

ONLY IF YOU ARE UNANIMOUSLY PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS SO OUTWEIGH THE MITIGATING FACTORS THAT JUSTICE CANNOT BE DONE BY ANY SENTENCE LESS THAN DEATH CAN YOU RETURN A DECISION IN FAVOR OF DEATH. EACH JUROR MUST DECIDE WHETHER THE LAW REQUIRES THAT [DEFENDANT] BE PUT TO

DEATH OR NOT. IF EVEN ONE JUROR FINDS A MITIGATING FACTOR PRESENT WHICH, IN THAT JUROR'S MIND, IS NOT OUTWEIGHED BEYOND A REASONABLE DOUBT BY THE AGGRAVATING FACTORS PROVED, THEN THE JURY MAY NOT SENTENCE LAMOND GARRETT TO DEATH.

DEATH PENALTY MUST BE UNANIMOUS

THE CAREFUL JUDGMENT THE LAW EXPECTS YOU TO EXERCISE IN THIS REGARD IS FURTHER REFLECTED IN THE FACT THAT, EVEN IF YOU ARE UNANIMOUSLY PERSUADED THAT AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS, YOU MUST STILL BE UNANIMOUSLY CONVINCED THAT THE AGGRAVATING FACTORS ARE SUFFICIENTLY SERIOUS TO MANDATE A SENTENCE OF DEATH RATHER THAN LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE. IF EVEN ONE JUROR CONCLUDES THAT JUSTICE CAN BE SERVED BY A SENTENCE OF LESS THAN DEATH, THE JURY CANNOT RETURN A DECISION IN FAVOR OF CAPITAL PUNISHMENT.

CONSEQUENCES OF DELIBERATION

IF, AFTER WEIGHING THE AGGRAVATING AND MITIGATING FACTORS, YOU UNANIMOUSLY RECOMMEND THAT A SENTENCE OF DEATH SHALL BE IMPOSED, THEN THE COURT IS REQUIRED TO SENTENCE THE DEFENDANT TO DEATH. IF YOU UNANIMOUSLY RECOMMEND THAT A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE SHALL BE IMPOSED, THEN THE COURT IS REQUIRED TO SENTENCE THE DEFENDANT ACCORDINGLY. IF FOR COUNT TWELVE YOU UNANIMOUSLY RECOMMEND A LESSER SENTENCE FOR THE DEFENDANT, **[CUT]** "OR FAIL TO UNANIMOUSLY AGREE ON ANY RECOMMENDATION FOR A SENTENCE".⁴ THE COURT WILL

⁴ SEE JONES V. U.S., 527 U.S. 373, 119 S.C.T. 2090, 2097-2100 (1999)(EIGHTH AMENDMENT DOES NOT REQUIRE COURT TO ADVISE JURY OF EFFECT OF FAILURE TO REACH UNANIMOUS VERDICT).

IMPOSE A SENTENCE AS AUTHORIZED BY LAW. IN DECIDING WHAT RECOMMENDATION TO MAKE, YOU ARE NOT TO SPECULATE ABOUT THE PARTICULAR SENTENCE THE DEFENDANT MIGHT RECEIVE IN THE EVENT YOU DO NOT RECOMMEND A SENTENCE OF DEATH OR LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE. THAT IS A MATTER FOR THE COURT TO DECIDE.

LIFE OPTION, DEATH IS NOT REQUIRED

I ALSO REMIND YOU, LADIES AND GENTLEMEN, THAT, WHATEVER FINDINGS YOU MAKE WITH RESPECT TO THE AGGRAVATING AND MITIGATING FACTORS, YOU ARE NEVER REQUIRED TO IMPOSE A DEATH SENTENCE. FOR EXAMPLE, THERE MAY BE SOMETHING ABOUT THIS CASE OR ABOUT [DEFENDANT] THAT ONE OR MORE OF YOU ARE NOT ABLE TO IDENTIFY AS A SPECIFIC MITIGATING FACTOR, BUT THAT NEVERTHELESS LEADS YOU TO DOUBT THAT THE DEFENDANT SHOULD BE SENTENCED TO DEATH. IN SUCH A CASE, THE JURY SHOULD RENDER A DECISION AGAINST THE DEATH PENALTY. ANY ONE OF YOU IS FREE TO DECIDE THAT A DEATH SENTENCE SHOULD NOT BE IMPOSED IN THIS CASE FOR ANY REASON YOU SEE FIT, SO LONG AS, BASED ON THE EVIDENCE AND YOUR SENSE OF JUSTICE, YOU CONCLUDE THAT THE PROVEN AGGRAVATING FACTORS DO NOT "SUFFICIENTLY" OUTWEIGH MITIGATION SUCH THAT THE DEATH PENALTY SHOULD BE IMPOSED.

DUTY TO DELIBERATE

IT IS YOUR DUTY AS JURORS TO DISCUSS THE ISSUE OF PUNISHMENT WITH ONE ANOTHER IN AN EFFORT TO REACH AGREEMENT, IF YOU CAN DO SO. EACH OF YOU MUST DECIDE THIS REMAINING QUESTION FOR YOURSELVES, BUT ONLY AFTER FULL CONSIDERATION OF THE EVIDENCE WITH THE OTHER MEMBERS OF THE JURY. WHILE YOU ARE

DISCUSSING THIS MATTER, DO NOT HESITATE TO RE-EXAMINE YOUR OWN OPINION, AND TO CHANGE YOUR MIND IF YOU BECOME CONVINCED THAT YOU ARE WRONG. BUT DO NOT GIVE UP YOUR HONEST BELIEFS AS TO THE WEIGHT OR THE EFFECT OF THE EVIDENCE SOLELY BECAUSE OTHERS THINK DIFFERENTLY OR SIMPLY TO GET THE CASE OVER WITH.

JUDGING EVIDENCE

AS IN THE GUILT PHASE OF THE TRIAL, YOU THE JURY ARE THE SOLE JUDGES OF THE FACTS IN THIS PART OF THE CASE. YOU MAY DECIDE ISSUES OF THE CREDIBILITY OF WITNESSES AND WHETHER OR NOT TO ACCEPT ANY PIECE OF EVIDENCE AS TRUE OR WHAT AMOUNT OF WEIGHT TO GIVE IT, IF ANY. AT THIS PHASE OF THE TRIAL, THE EVIDENCE CONSISTS OF ALL THE EVIDENCE RECEIVED AT THE GUILT PHASE OF THE TRIAL TO THE EXTENT IT IS RELEVANT TO YOUR INQUIRY REGARDING THE EXISTENCE OF ANY THRESHOLD ELIGIBILITY, AGGRAVATING OR MITIGATING FACTORS.

YOU MAY ALSO CONSIDER ANY EVIDENCE RECEIVED AT THE PENALTY PHASE OF THE TRIAL, INCLUDING TESTIMONY, DOCUMENTS AND STIPULATIONS BETWEEN THE PARTIES. YOU MAY ONLY CONSIDER EVIDENCE RECEIVED IN THIS COURTROOM IN MAKING YOUR DETERMINATION. AS IN THE GUILT PHASE, THE ARGUMENTS OF THE ATTORNEYS AND THE COMMENTS AND RULINGS OF THE COURT ARE NOT EVIDENCE. YOU MAY CONSIDER BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE AT THIS PHASE OF THE TRIAL AND YOU MAY USE YOUR COMMON SENSE IN DETERMINING WHETHER AGGRAVATING OR MITIGATING FACTORS ARE ESTABLISHED.

THE WEIGHING PROCESS YOU ARE CALLED UPON TO UNDERTAKE IN THIS PORTION OF THE TRIAL IS DIFFERENT FROM THE FACT FINDING

PROCESS. ONCE YOU HAVE FOUND THE THRESHOLD ELIGIBILITY, AGGRAVATING AND MITIGATING FACTORS, IF ANY, YOU MUST USE YOUR EXPERIENCE, JUDGMENT, AND SENSE OF JUSTICE IN WEIGHING THE AGGRAVATING AND MITIGATING FACTORS TO ARRIVE AT YOUR ULTIMATE RECOMMENDATION IN THIS CASE.

DEFENDANT'S RIGHT NOT TO TESTIFY

[DEFENDANT] DID NOT TESTIFY. YOU MAY NOT ATTACH ANY SIGNIFICANCE TO THIS FACT OR EVEN DISCUSS IT IN THE COURSE OF YOUR DELIBERATIONS. UNDER OUR CONSTITUTION, A DEFENDANT HAS NO OBLIGATION TO TESTIFY OR TO PRESENT ANY OTHER EVIDENCE.

IT IS THE PROSECUTION'S BURDEN BOTH TO PROVE GUILT BEYOND A REASONABLE DOUBT AND, AT THIS STAGE OF THE PROCEEDING, TO PROVE BEYOND A REASONABLE DOUBT THAT JUSTICE MANDATES A SENTENCE OF DEATH RATHER THAN LIFE IN PRISON WITHOUT ANY POSSIBILITY OF RELEASE, OR SOME LESSER PRISON SENTENCE. AS I HAVE TOLD YOU, A DEFENDANT IS NOT REQUIRED TO PROVE THAT HE SHOULD BE ALLOWED TO LIVE. THUS, NO ADVERSE INFERENCE MAY BE DRAWN AGAINST A DEFENDANT WHO DOES NOT TAKE THE STAND. NOR MAY THE ABSENCE OF TESTIMONY BY LAMOND GARRETT BE CONSIDERED IN ANY WAY RELEVANT TO THE ISSUE OF REMORSE FOR HIS ROLE IN THE DEATH OF THE VICTIM.

SPECIAL FINDINGS VERDICT FORMS

AS YOU RETIRE TO BEGIN YOUR DELIBERATIONS, YOU WILL BE PROVIDED WITH A FORM ENTITLED "SPECIAL VERDICT FORM" TO RECORD YOUR DETERMINATIONS. YOU SHOULD CONSIDER EACH COUNT SEPARATELY. YOU ARE REQUIRED TO RECORD YOUR DETERMINATIONS AS TO THE EXISTENCE OR NON-EXISTENCE OF EACH "THRESHOLD ELIGIBILITY FACTOR" AND AGGRAVATING FACTOR. SECTION I OF THE SPECIAL

VERDICT FORM REQUIRES YOU TO RECORD YOUR FINDINGS WITH RESPECT TO LAMOND GARRETT'S AGE. SECTION II OF THE SPECIAL VERDICT FORM CONTAINS SPACE TO RECORD YOUR WRITTEN FINDINGS ON THRESHOLD ELIGIBILITY FACTORS. SECTION III OF THE SPECIAL VERDICT FORM CONTAINS SPACE TO RECORD YOUR WRITTEN FINDINGS ON STATUTORY AGGRAVATING FACTORS. SECTION IV OF THE SPECIAL VERDICT FORM CONTAINS SPACE TO RECORD YOUR WRITTEN FINDINGS ON NON-STATUTORY AGGRAVATING FACTORS. REMEMBER THAT YOU MUST BE UNANIMOUS AS TO THE EXISTENCE OF ANY AGGRAVATING FACTOR THAT YOU DETERMINE TO HAVE BEEN ESTABLISHED BEYOND A REASONABLE DOUBT.

IN ADDITION, YOU HAVE THE OPTION TO RETURN WRITTEN FINDINGS AS TO THE EXISTENCE OR NON-EXISTENCE OF EACH MITIGATING FACTOR, IF YOU SO CHOOSE, BUT YOU ARE NOT REQUIRED TO RETURN SUCH FINDINGS. SECTION V OF THE SPECIAL VERDICT FORM CONTAINS SPACE TO RECORD WRITTEN FINDINGS ON MITIGATING FACTORS, IF YOU CHOOSE TO DO SO. IF YOU CHOOSE NOT TO DO SO, CROSS OUT EACH PAGE OF SECTION V WITH A LARGE "X." IN THIS CASE, THE DEFENDANT HAS REQUESTED THAT YOU RECORD WRITTEN FINDINGS ON THE MITIGATING FACTORS. BECAUSE ANY ONE JUROR MAY FIND THE EXISTENCE OF ANY MITIGATING FACTOR, SPACE IS PROVIDED FOR YOU TO NOTE HOW MANY JURORS FIND ANY PARTICULAR MITIGATING FACTOR.

SECTION VI IS WHERE YOU SHOULD RECORD YOUR ULTIMATE RECOMMENDATION AS TO WHAT PENALTY SHOULD BE IMPOSED AND EACH JUROR SHOULD SIGN AND DATE THE FORM.

JUSTICE WITHOUT DISCRIMINATION

FINALLY, IN YOUR CONSIDERATION OF WHETHER THE DEATH SENTENCE IS JUSTIFIED, YOU MUST NOT CONSIDER THE RACE, COLOR,

RELIGIOUS BELIEFS, NATIONAL ORIGIN, OR SEX OF ANY OF THE DEFENDANT OR THE VICTIM IN THIS CASE. THESE FACTS ARE COMPLETELY IRRELEVANT TO THE IMPORTANT ISSUES YOU MUST CONSIDER AT THIS PHASE OF THE PROCEEDINGS.

YOU ARE NOT TO RECOMMEND A SENTENCE OF DEATH UNLESS YOU HAVE CONCLUDED THAT YOU WOULD RECOMMEND A SENTENCE OF DEATH FOR THE CRIME IN QUESTION NO MATTER WHAT THE RACE, COLOR, RELIGIOUS BELIEFS, NATIONAL ORIGIN, OR SEX OF EITHER THE DEFENDANT OR THE VICTIM MIGHT HAVE BEEN. TO EMPHASIZE THE IMPORTANCE OF THIS CONSIDERATION, SECTION VI OF THE SPECIAL FINDINGS FORM CONTAINS A CERTIFICATE THAT MUST BE SIGNED BY EACH JUROR. WHEN YOU HAVE REACHED A DECISION, EACH OF YOU IS TO SIGN THE CERTIFICATE -- BUT ONLY IF THIS IS SO --ATTESTING THAT CONSIDERATIONS OF RACE, COLOR, RELIGIOUS BELIEFS, NATIONAL ORIGIN, OR SEX OF THE DEFENDANT OR THE VICTIM WAS NOT INVOLVED IN REACHING YOUR INDIVIDUAL DECISION, AND ATTESTING THAT YOU WOULD HAVE MADE THE SAME RECOMMENDATION REGARDING A SENTENCE FOR THE CRIME IN QUESTION NO MATTER WHAT THE RACE, COLOR, RELIGIOUS BELIEFS, NATIONAL ORIGIN OR SEX OF THE DEFENDANT OR THE VICTIM MIGHT HAVE BEEN.